No 1019
Motion to dismiss
Stong Oct 22/80

House
12-121

SUPREME COURT OF THE UNITED STATES.

No. 1019

GEORGE HAYES,
Plaintiff in Error,

vs.

VALENTINE FISCHER,
Defendant in Error.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, SECOND CIRCUIT.

FILED

BRIEF ON PART OF DEFENDANT IN ERROR ON MOTION TO VACATE APPEAL.

Banking Co.

vs

Insurance Co

12 Leigh 121.

Dismissed for want
of Jurisdiction

Mr Wood.

No 1019.
Motion to dismiss

Nov 4 Oct 22/80

House

12-121

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BRIEF ON PART OF DEFENDANT IN ERROR ON MOTION TO VACATE APPEAL.

1

Supreme Court of the United States.

GEORGE HAYES,
Plaintiff in Error,

vs.

VALENTINE FISCHER,
Defendant in Error.

Docket No.

2

Appeal from the Circuit Court of the United States for the Southern District of New York, Second Circuit.

Please take notice that on the opening of this Court for the October Term, 1880, to wit, on the 2d Monday of October, 1880, I shall move for an order dismissing this appeal. 3

The said motion will be made upon the record herein, on the ground that this Court has not jurisdiction to entertain and determine said appeal.

New York, August 13th, 1880.

CHARLES F. BLAKE,
Attorney and Counsel for Valentine Fischer,
Defendant in Error.

To J. H. Whitelegge, Esq., 4
Attorney and Counsel for George Hays,
Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

GEORGE HAYES,
Plaintiff in Error,

vs.

VALENTINE FIISCHER,
Defendant in Error.

Brief for Defendant in error on motion to dismiss appeal or writ of error.

This is a motion to dismiss the appeal or writ of error herein, and is submitted on the ground, that the proceedings sought to be reviewed are not reviewable here. The papers on which this notice is made are :

(1) NOTICE OF MOTION FOR ATTACHMENT, AND PROOF OF SERVICE.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORL.

[*In Equity.*]

VALENTINE FISCHER

vs.

GEORGE HAYES.

Please take notice that I shall move this Court, on the 16th day of January, 1880, at the opening of Court on that day, or as soon thereafter as counsel

can be heard, for an order for attachment for contempt and punishment herein, notice of motion for which has heretofore been served on you, and which motion has been partially heard and was referred to John A. Shields, Esq., referee on the 1st day of August, 1879. 9

And at the hearing of said motion I shall read to the Court and refer to all the proceedings in this cause, the testimony taken before the said Referee; the report of said Referee, filed on the 8th day of January, 1880, and all proceedings, documents, 10 record and exhibits filed in this Court in the case of Valentine Fischer *vs.* Henry Wilson *et al.*

New York, Jannary 8, 1880.

CHARLES F. BLAKE,
Solicitor for Complainant.

To J. H. Whitelegge, Esq.,
Solicitor for Defendant,
And Ethan Allen, Esq.,
Defendant's Solicitor.

11

City, County and State of New York, ss.:

DANIEL KENNIFF, being duly sworn, says: I am in the employ of Charles F. Blake, Esq., counselor-at-law, 16 Murray street, New York City. On the 8th day of January, 1880, I personally served the above notice on J. H. Whitelegge, Esq., by handing to him in person, at his office, No. 136 Chambers street, in the City of New York, a true copy thereof on said day. And also, on said day, personally served the said notice on Ethan Allen, Esq., by 12 handing to him in person, at his office, No. 102 Broadway, in said New York City, a true copy of the above notice. The above mentioned services, and both of them, were made between the hours of three and five on said day. And both the said

Whitelegge and said Allen read the said notice in my presence.

DANIEL KENNIFF.

Subscribed and sworn to before me this 9th day of January, 1880.

PHILLIPS ABBOTT,
Notary Public,
Kings and New York Counties,
State of New York.

[Seal].

City, County and State of New York, ss.:

PHILLIPS ABBOTT, being duly sworn, says: I am managing clerk in the office of Charles F. Blake, Esq., counsel for plaintiff herein. On the 9th day of January, 1880, I personally served the above and hereto annexed notice on George Hayes, the defendant herein, by reading to George Hayes, son of said George Hayes, defendant, the same, and leaving with him a true copy of said notice. The said service was made at the office of said George Hayes, defendant, 71 Eighth avenue, New York City, between one and twelve o'clock on said day, to wit, the 9th day of January, 1880.

PHILLIPS ABBOTT.

Subscribed and sworn to before me this 9th day of January, 1880.

W. L. BENNEM,
Notary Public,
Kings and New York Counties,
New York.

[Seal].

(2) ORDER OF REFERENCE.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[*In Equity.*]

VALENTINE FISCHER

vs.

GEORGE HAYES.

On motion of Charles F. Blake, Esq., counsel for the complainant herein, it is ordered that the defendant permit and suffer the complainant, with Mr. Phillips Abbott and Mr. J. N. McIntire, or either of them, or either of them alone, to go over all or any of the defendant's shops or manufactories, and inspect the machines set up there for bending sheet metal, and to observe the method or methods of bending such sheet metal of the said defendant as used in his said shop or manufactories, for which purpose the said defendant is to put his machinery at work in the presence of the said complainant and such viewers, and to afford every facility to them to ascertain the method of bending sheet metal by the means of the defendant's apparatus and every part thereof. It being the object and intention of this Court to enable the complainant herein to present such evidence to the Court herein as will enable the complainant to make out, if the fact be so, the infringement of the patent here in suit, and a contempt of the injunction heretofore issued and served herein.

Said inspection to be made between the hours of nine in the morning and five in the afternoon of the day thereof.

And it is further ordered that it be referred to John A. Shields, Esq., to ascertain the fact of said

Whitelegge and said Allen read the said notice in my presence.

DANIEL KENNIFF.

Subscribed and sworn to before me this 9th day of January, 1880.

PHILLIPS ABBOTT,
Notary Public,
Kings and New York Counties,
State of New York.

[Seal].

City, County and State of New York, ss.:

PHILLIPS ABBOTT, being duly sworn, says: I am managing clerk in the office of Charles F. Blake, Esq., counsel for plaintiff herein. On the 9th day of January, 1880, I personally served the above and hereto annexed notice on George Hayes, the defendant herein, by reading to George Hayes, son of said George Hayes, defendant, the same, and leaving with him a true copy of said notice. The said service was made at the office of said George Hayes, defendant, 71 Eighth avenue, New York City, between one and twelve o'clock on said day, to wit, the 9th day of January, 1880.

PHILLIPS ABBOTT.

Subscribed and sworn to before me this 9th day of January, 1880.

W. L. BENNEM,
Notary Public,
Kings and New York Counties,
New York.

[Seal].

(2) ORDER OF REFERENCE. 17

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.
[*In Equity.*]

VALENTINE FISCHER
vs.
GEORGE HAYES. 18

On motion of Charles F. Blake, Esq., counsel for the complainant herein, it is ordered that the defendant permit and suffer the complainant, with Mr. Phillips Abbott and Mr. J. N. McIntire, or either of them, or either of them alone, to go over all or any of the defendant's shops or manufactories, and inspect the machines set up there for bending sheet metal, and to observe 19 the method or methods of bending such sheet metal of the said defendant as used in his said shop or manufactories, for which purpose the said defendant is to put his machinery at work in the presence of the said complainant and such viewers, and to afford every facility to them to ascertain the method of bending sheet metal by the means of the defendant's apparatus and every part thereof. It being the object and intention of this Court to enable the 20 complainant herein to present such evidence to the Court herein as will enable the complainant to make out, if the fact be so, the infringement of the patent here in suit, and a contempt of the injunction heretofore issued and served herein.

Said inspection to be made between the hours of nine in the morning and five in the afternoon of the day thereof.

And it is further ordered that it be referred to John A. Shields, Esq., to ascertain the fact of said

21 infringement, if the same be so, and report his finding to this Court. And that the complainant may examine, before the said Referee, George Hayes and any and all his employees and assistants, and that both parties may examine such other witnesses as they may elect to examine.

SAM'L BLATCHFORD.

(3) REPORT OF JOHN A. SHIELDS, REFEREE.

22 CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

VALENTINE FISCHER

vs.

GEORGE HAYES.

23

I, JOHN A. SHIELDS, the referee to whom it was referred, by an order made and entered on the first day of August, A. D. 1879, "to ascertain the fact of said infringement, if the same be so," and report my findings to the Court, do hereby report that I have been attended by counsel for the respective parties, and have taken and examined the testimony of such of the witnesses as were produced before
24 me.

I find that on the 30th day of June, A. D. 1879, as appears by the files and records of the Clerk's office, an order of this Court was duly entered, adjudging said defendant George Hayes in contempt, for using a machine for bending sheet metal contrary to the terms of an injunction theretofore issued and served.

About the date of such order, as appears from the testimony of the defendant, John Prentice and

Hans Mortenson, the defendant caused to be changed the appearance of the male die, by cutting a longitudinal groove on each side. Some contention arose as to whether these grooves were cut in the working face of the die. Mr. McIntyre, the only mechanical expert produced before me, in answer to cross-questions 49 and 51, testifies that, these grooves are not cut in the working face of the die, while on the other hand the defendant claims that because, in the process of bending the metal, the angles made must necessarily cover the grooves thus found, they are directly in the working face. 25 26

Whether they are or are not in the working face of the male die is not, it seems to me, a material question to be determined by the Referee. I find, however, from the testimony and exhibits before me, and from a personal inspection of the machines and dies at the factory of the defendant, that the male die in use by the defendant since the 30th day of June, 1879, are identical with the models filed herewith. It is claimed on the part of the defendant that if such grooves would retain scales or dirt detached from the metal while being subjected to the combined action of the male and female die, it would be no violation of the fourth claim of the complainant's patent. I find that in working the dies as changed, dirt and scales might find lodgement in such grooves--the evidence of Mr. Hayes, Hans Mortenson and others being direct and positive on this point. I find and report, however, that the defendant testifies that these grooves furnish a mixture of advantage and disadvantage, the advantage being in case where lumps or scales "of convenient size and position" occur on the sheet of metal to be bent. He further testifies, in response to cross-question 36, that these lumps occur frequently; and in response to cross-question, 37, he says they occur "perhaps not one on a dozen sheets, or there may come one on a sheet, or several in succession," the disadvantage being that dirt and scale would collect in such grooves. On this point, however, Mr. 27 28

29 McIntyre testifies, in response to cross-question 52, "I don't think they would be likely to retain any dirt or scale of any consequence, but if they did, or if other recesses were substituted for them, that would fill up chock full of dirt or scale, the presence of the latter in such recesses would not, in my judgment, materially interfere with the successful operation of the dies."

I report these facts to the Court because of the stress laid on them by the counsel for the defend-
30 ant.

The main question before me, as stated in the order of reference; is, has the defendant, since the last proceedings on contempt, infringed the complainant's patent? I find that the defendant has infringed the fourth claim of said patent.

The evidence upon which I base such finding being the undisputed testimony of Mr. McIntyre, who states from personal examination of the dies in use by defendant, that the Hayes machine consisted of
31 a male and female die adapted to make angular bends in the sheet metal subjected to their action, the female die being so located or arranged relatively to the male die as to be uppermost, so that no dirt or scale could collect in its cavity or recessed face, either to mar the work or tend to mar or strain the dies; and the male die, which was lowermost, was so constructed that no dirt or scale could collect and remain on its working face to create by its presence any
32 such difficulties as above alluded to.

No testimony was introduced or offered on the part of the defendant showing, or tending to show, that any change was made in the dies in question, or the mode of operating the same other than the creating of the longitudinal grooves, which, in my opinion, has no bearing on the question before me, for the reason that, from an actual personal inspection of the dies in operation at the defendant's factory, I could not see that such grooves contributed any aid in the process of bending the metal.

The testimony taken before me is filed herewith. 33
All of which is respectfully submitted.

JOHN A. SHIELDS,
Referee.

(4) ORDER OF COURT ON REPORT.

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

34

VALENTINE FISCHER *vs.* GEORGE HAYES.	On motion for second attachment for contempt.

Present—The HONORABLE SAMUEL BLATCHFORD, *Circuit Judge.*

This motion having been heard on the 1st day of 35
August, 1879, on affidavits and argument by counsel for the respective parties, and thereupon an order having been duly made that it be referred to John A. Shields to ascertain the fact of said infringement, if the same be so, and report his finding to this Court; and upon the coming in of the report of said Referee and hearing counsel for the respective parties in support thereof and in opposition thereto, said report was confirmed; and it was then further ordered that the complainant file with the Court (and 36
serve copies on the defendant) affidavits showing the expenses incurred in the prosecution of this second attachment for contempt, that defendant file and serve answering affidavits, and that complainant may reply thereto; all such affidavits to be filed with the Court without argument on or before a day named in said order; now these affidavits having been filed and the affidavit of George Hayes, the defendant, executed on the 26th day of February, 1880, having been filed in reply to said complainant's affidavits, it is, upon consideration thereof, ordered

37 that the defendant pay into Court the sum of $522.49, as set forth in the affidavit of Baron Higham, executed therein on the 16th day of February, 1880, and the further sum of $867.50, as set forth in the affidavit of Valentine Fischer, executed herein on the 20th day of February, 1880, amounting together to the sum of $1,389.99 (thirteen hundred and eighty-nine $\frac{99}{100}$ dollars) as a fine for said second contempt, within thirty days from the date of the entry of this order, to wit, the 12th day of April, 1880; and that
38 if not paid the defendant stand committed till it be paid, and that when paid it be paid over to the plaintiff in reimbursement.

Dated New York, March 12, 1880.

SAMUEL BLATCHFORD.

Indorsed:

City, County and State of New York, ss:

DANIEL KENNIFF, being duly sworn, says: That he served a copy of the within order on J. H. Whittlegge, Esq., on said March 9th, 1880, at his office,
39 136 Chambers street, New York City, by leaving said copy with some one in charge of said Whittlegge's office, and also at the same time delivered to him a letter, of which the following is a copy:

Fischer }
v. }
Hayes. }

MARCH 9th, 1880.

James H. Whittlegge, Esq.

DEAR SIR—We enclose herewith copy of an order to be submitted to Judge Blatchford for his ap-
40 proval.

The changes in this order from the one sent you yesterday, are made by the suggestion of the Court.

Yours, truly,

CHARLES F. BLAKE.

DANIEL KENNIFF.

Subscribed and sworn to before me, }
this 11th day of March, 1880. }

PHILLIPS ABBOTT,

[L. S.] Notary Public,

Kings and New York Counties,

State of New York.

U. S. C. C., S. D. N. Y. 41

Valentine Fischer *vs.* George Hayes. Charles F. Blake, sol'r for complainant, 16 Murray street, New York. U. S. Circuit Court. Filed March 13th, 1880.

JOHN I. DAVENPORT,
Clerk.

A copy.
JOHN I. DAVENPORT,
Clerk.

42

City and County of New York, ss.:

J. WILLIAM HARRINGTON, being duly sworn, says: On the 16th day of March, 1880, I personally served on George Hayes in person, by handing the same to him at his place of residence, 71 Eighth avenue, in the City of New York, a duly certified copy of the within order, and on the 17th day of March, 1880, I personally served a like duly certified copy of the within order on J. H. Whittlegge, by handing the same to him in person at his office, 136 Chambers street, 43
New York City.

J. WM. HARRINGTON.

Subscribed and sworn to before me, }
this 17th day of March, 1880. }

PHILLIPS ABBOTT,
Notary Public,
[L. S.] Kings and New York Counties,
State of New York.

44

45 (5) AFFIDAVIT AND ORDER GRANTING STAY.

CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

VALENTINE FISCHER,
Complainant,

against

46

GEORGE HAYES,
Defendant.

At a Stated Term of this Court, held April 13, 1880, in the General Post-office building in the City of New York.

On reading and filing the deposition of George Hayes, the defendant, and on all the proceedings and order of conviction herein, it is hereby ordered that all further proceedings herein, on the part of the complainant herein, be and the same
47 are hereby stayed for the period of thirty days from the date hereof, to enable the defendant, George Hayes, to comply with said order.

SAM'L BLATCHFORD.

CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

48

VALENTINE FISCHER

vs.

GEORGE HAYES.

In Proceedings for Alleged Contempt of Court.

Southern District of New York, ss.:

GEORGE HAYES, being duly sworn, says: I am the defendant herein, and was by an order of this Court, made and entered herein on or about the

15th day of March, 1880, directed to pay into the Clerk's office of this Court the sum of $1,389.99 as a fine for an alleged contempt in violating a restraining order issued herein *pendente lite*. That since said order was made, and under advice of my counsel, I have made every reasonable effort to comply with the terms of said order but without avail. That I have not the means at this time to pay said fine or any part thereof, owing to my inability to collect outstanding debts due to me; and to be imprisoned at this time in default of said payment would be ruinous to my business and to my business interests, and would leave my little children, who are motherless, without that care to which they are entitled from me. My counsel has advised me, and I verily believe, that said fine was imposed by this Court under a mistake of fact, and that in his judgment the same is unwarranted and cannot be sustained on review. That I will in good faith take the necessary steps to review the same if this Court, will grant me a short stay for that purpose. That whilst I find no fault with such punishment, if I were really guilty of the offense charged, I ask the Court to afford me the necessary opportunity which is of right awarded to all whose liberty and property are jeopardized in similar cases, and therefore pray the Court to grant me a stay of all further proceedings heirein, for such further period as may seem meet, so that I may take such steps as are necessary to review the order of controversy herein.

GEORGE HAYES,

Sworn to before me this
13th day of April, 1880.

[L.S.] JOHN A. OSBORNE,
U. S. Commissioner.

52 (6) WRIT OF ERROR.

United States of America, ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States for the Southern District of New York, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, convicting the plaintiff in error, for an alleged contempt of said
54 Court, which is in the said Circuit Court, before you, or some of you, between George Hayes, the plaintiff in error, and Valentine Fischer, the defendant in error, a manifest error hath happened, to the great damage of the said George Hayes, the plaintiff in error herein, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment of such
55 conviction be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court
56 may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable MORRISON R. WAITE, Chief Justice of the Supreme Court of the United States, this 11th day of May, in the year of our Lord one thous-

[SEAL.]

and eight hundred and eighty, and of the Independence of the United States the ninety- 57

JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

Allowed: May 11th, 1880.
SAMUEL BLATCHFORD.

58

(7) CITATION.

United States of America, ss.:

To Valentine Fischer, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, on the second Monday of October next, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States, for the Southern District of 59 New York, wherein George Hayes is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment, (convicting the said plaintiff in error of an alleged comtempt of said Court, and arising in a suit in equity, founded upon an alleged infringement of certain Letters Patent, said to be the property of said defendant in error), in said writ of error mentioned, should not be corrected, and speedy justice should not be done 60 to the parties in that behalf.

Witness, the Honorable Samuel Blatchford, Circuit Judge, of the Second Judicial Circuit of the United States, this 11th day of May, A. D. 1880.

SAML. BLATCHFORD.

61 **BRIEF.**

I. It has long been the settled law of the Courts of this country and of Great Britain, that a commitment for contempt is not reviewable. This rule was first laid down by this Court in *Ex parte Kearney*, 7 Wheat., 41, citing Crosby's case, 3 *Wils.*, 188: "The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interfering, to each respective Court."

The same rule was again applied in the case of
62 *New Orleans vs. Steamship Company*, 20 Wallace, 387.

II. No right of appeal can be claimed in this case under the first subdivision of § 699 Revised Statutes, giving an appeal in "any case touching patent rights." "When a Court commits a party for contempt, their adjudication is a conviction and their commitment in consequence is execution." (STORY, *J.*, in *Ex parte Kearney*, 7 Wheat., p. 42.)

The question in a contempt proceeding is not
63 whether the patent is valid or invalid, nor whether the defendant is an infringer or not; but whether the order of the Court has been obeyed. In such an inquiry the question whether the acts done constitute a practising of the invention in behalf of which the injunction has been granted may sometimes involve the construction of the patent or a comparison of the devices it claims with the devices of the defendants. Still such inquiries do not always arise upon an attachment; as, for instance,
64 when the contempt consists in the continued use of the machine already enjoined.

This Court has no jurisdiction to re-examine such questions. It has no jurisdiction of contracts regarding patents, although questions relating to their validity and scope constantly arise in such cases. It is only where the relief sought depends directly upon the patents themselves that the relief granted by the statute applies.

CHARLES F. BLAKE,
Solicitor and Counsel,
for VALENTINE FISCHER,
Defendant in

OFFICE SUPREME COURT U.
FILED
OCT 16 1880
JAMES H. McKENNEY, CLK

Supreme Court of the United States,

GEORGE HAYES,
Complainant in Error,
against
VALENTINE FISCHER,
Defendant in Error.

Brief of plaintiff in Error.

STATEMENT.

VALENTINE FISCHER, above named, in a suit in which he was complainant, and wherein the plaintiff in error was defendant, obtained an injunction—*pendente lite*—restraining, the plaintiff herein from using a patented device, then contested in said suit.

On motion for the injunction the opinion of His Honor, Blatchford, J., in the case of Fischer *versus* Wilson and others, JUST BEFORE ADJUDICATED, was read in support thereof, and under the construction which Hayes, his counsel and others, put, upon this opinion, he (Hayes), was led to believe—as the record shows—that by cutting grooves into the working face of the lower or male die, he would not

be a wrong doer. He cut the grooves therein, one into each working face of the lower die, and thus altered, he used the dies for several days in bending sheet metals. It was contended that this was *an infringment*, and thereupon, and on the application of the counsel for Fischer, the Court ordered an *inspection*, and a reference to John A. Shields, Esq., "to ascertain the fact of said infringement," with liberty to complainant to EXAMINE THE DEFENDANT GEORGE HAYES, before the referee, &c. &c., (*fol.* 21 *of motion papers*). Mr. Shields reported the proofs to the court, (motion papers pp. 6 to 8,) and on the 13th day of March, 1880, an adjudication followed (*pp.* 9, 10), in no part of which or in the record, does it appear that defendant has been found guilty of a "CONTEMPT OF COURT," technical or otherwise, nevertheless the adjudication directs that he (Hayes) pay $1389.99 to re-emburse the defendant in error, for fees, costs, &c., in the prosecution of the motion—"AS A FINE FOR SAID SECOND CONTEMPT"—and "THAT HE STAND COMMITTED TILL IT BE PAID." & accordingly a commitment issued to the marshall whose action was stayed by the bond to herein.

POINTS.

I. The proceedings though to some extent criminal in their character, are nevertheless founded upon an act alleged to have been committed in a "*patent* case," and are distinguished from that class of cases preceded by indictment, as coming within the purview of §697 of the Revised Statutes.

It would seem, by a parity of reasoning, that Congress, by the statutes cited, not only intended to distinguish this class of cases from those wherein the conviction must, of necessity, be preceded by indictment, &c.; but, that such review should be accomplished through, or by means of, the writ of error, as contra-distinguished from an appeal, and this too, without regard to the "*amount in dispute*," (§ 699, Subd. 2).

It is eminently proper that such jurisdiction should exist, for the correction of the manifest er-

rors disclosed by the record herein.

Neither the proceedings, or the *judgment or sentence* are IN THE NAME OF THE PEOPLE; on the contrary, it seems to be a proceeding on the part of the defendant in error and exclusively in his name.

As the law stood before the act of 1870, (16 U. S. Stat., 207-215,) writs of error and appeals from judgments and decisions in patent cases, were grantable, of course, to either party to a suit, "*in the same manner*," &c., as was "provided by law in other judgments and decrees," of Circuit Courts, &c., and this related to *final* judgments.

The jurisdiction of this Court was, by said act, extended so as to embrace ANY CASE "touching patent-rights, or copy-rights," and evidently meant to embrace something more than that included in prior statutes.

Before the passage of the act in question, the jurisdiction of this Court was amply sufficient to enable it to review *any final* decree, or judgment, of a Circuit Court in *patent*, &c., *cases*, (12 Stat., 130,) so that, in this respect, it was unnecessary to enlarge its powers, or its jurisdiction; hence, by the Statute of 1870, it would appear that, Subd. 1, of § 699, of the Revised Statutes, was not only intended to embrace *any final* judgment in such cases, but, on the contrary, it seems to have been intended to meet just the very class of cases to which this writ of error applies.

The case cited in the brief for the defendant in error, are dissimilar to the case at bar in this :

> (1) In the case reported in the 7 *Wheaton* p. 41, the punishment meted out to the contumacious witness was within the power and authority of the Court inflicting it; so also the tribunal which consigned Crosby to the Tower of London, had the indisputable power to do so (Crosby's case, 3 Wilson 188); from neither of which convictions did

the statute authorize an appeal or writ of error.

(2.) In each of the cases cited, the petitioners were FOUND *guilty* of a contempt.

(3.) The *regularity* of the proceedings resulting in both convictions were not questioned. but see Ex-parte Lange 20 Wall. 163: & cases cited

In the case at bar the Court below exceeded its jurisdiction (*see p. p.* 5, *and* 6, *of def't's brief*,) in granting its order compelling the plaintiff in error to do an act expressly forbidden by statute, *i. e.*: TO TESTIFY AGAINST HIMSELF, in this proceeding under compulsory process. & in the alternate and cumulative sentences. See R. 60, Morning papers & pol. 216 & 7 Return.

It will be seen from the record returned herein, that the Court below exceeded its jurisdiction throughout the entirety of the proceedings. In the first place and as just mentioned, it made an order on the first day of August, 1879, directing

First.—That plaintiff in error permit and suffer TWO STRANGERS—Abbott and McIntyre—to enter upon the premises owned and occupied by plaintiff, "to go *over* all, or any part of (his) shop, or manufactories, and to observe the method, or methods of bending sheet metal, BY THE MEANS OF THE DEFENDANT'S APPARATUS, AND EVERY PART THEREOF. IT BEING THE OBJECT AND INTENTION OF THIS COURT, *to enable the complainant to make out if the fact be so.* THE INFRINGMENT OF THE PATENT HERE IN SUIT, AND A CONTEMPT OF THE INJUNCTION, &c., issued herein."

Secondly.—The order referred the main

question in the suit to a Referee to ascertain the fact of INFRINGMENT, and report his FINDING to the Court, when in fact, issue had not been joined in the suit for infringments.

Thirdly.—The order provided for THE COMPULSORY EXAMINATION of the plaintiff in error, and to give effect to this, compulsory process issued out of, and under the seal of the court below, directed to the plaintiff, requiring him to appear before the Referee and to be examined as a witness against himself; he obeyed the process, and as such witness his testimony was compulsc
purpose of proving
process or fr – betwe

This, we submit, is a course whc
and wholly unauthorised by Statu
mon law.

The provision in the order commanding plaintiff to permit strangers to invade his workshop, is a violation of a constitutional right, under the fourth article of the *Federal constitution*, is extra-judicial, and is reviewable by writ of error, (Rev. Stat., § 699, Subd. 4). The obvious meaning of this subdivision being that, when the Writ of Error is "BROUGHT ON ACCOUNT OF THE DEPRIVATION OF ANY RIGHT," &c., jurisdiction vests.

The compulsory measures thus adopted to convict Mr. Hayes, (the plaintiff), are in clear violation of § 860 of the U. S. *Rev. Stat.*, (see the order of the court below at *p. p.* 5 and 6 of

the statute authorize an appeal or writ of error.

(2.) In each of the cases cited, the petitioners were FOUND *guilty* of a contempt.

(3.) The *regularity* of the proceedings resulting in both convictions were not questioned. but see Ex-parte Lange 20 Wall. 163! & cases Cited

In the case at bar the Court below exceeded its jurisdiction (*see p. p. 5, and 6, of def't's brief,*) in granting its order compelling the plaintiff in error to do an act expressly forbidden by statute, *i. e.*: TO TESTIFY AGAINST HIMSELF, in this proceeding under compulsory process. & in the alternate and

cumulative sentences. Both 607 morning papers & fol. 216 &c of Return.

It will be seen from the record returned herein, that the Court below exceeded its jurisdiction throughout the entirety of the proceedings. In the first place and as just mentioned, it made an order on the first day of August, 1879, directing

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This, we submit, is a course wholly unwarranted, and wholly unauthorised by Statute, or by the common law.

The provision in the order commanding plaintiff to permit strangers to invade his workshop, is a violation of a constitutional right, under the fourth article of the *Federal constitution*, is extra-judicial, and is reviewable by writ of error, (Rev. Stat., § 699, Subd. 4). The obvious meaning of this subdivision being that, when the Writ of Error is "BROUGHT ON ACCOUNT OF THE DEPRIVATION OF ANY RIGHT," &c., jurisdiction vests.

The compulsory measures thus adopted to convict Mr. Hayes, (the plaintiff), are in clear violation of § 860 of the U. S. *Rev. Stat.*, (see the order of the court below at *p. p.* 5 and 6 of

brief, on the part of *defendant in error;* and this raises a question reviewable here. See ex-parte Siebold 10 Otto 371; Ex-parte Lange 18 Wall 163;

II. It is urged on the part of defendant in error —citing several cases—that this court has not the power to review this conviction, for the reason that the court below is clothed with *exclusive* pow r, in the premises, and that its judgment in such cases cannot be reviewed, and that no jurisdiction is conferred upon this court by §699, Rev. Stat., to correct an abuse of power in the court below, in the cases therein specified.

These grounds we respectfully submit, are untenable, because:

1—The words. "*Any final judgment at law*," *subd.* 2, §699, evidently are intended to go beyond the statute, (12 stat., §130,) theretofore, regulating appeals to this court, in patent cases, and which now include an interlocutory judgment.

2—This court has the power to "affirm, *modify*, or *reverse* ANY judgment, OR ORDER, of a Circuit Court, and of course this power necessarily carries with it the power to review the same §701.

There is an obvious distinction between the matter embraced in the *second* and *third* subdivisions of §699, and that which precedes, in the same section.

First—A writ of error is allowable as a matter of right, "to review ANY final judgment at law," without regard to the sum or value in dispute, and in any *case* (the words *suit*, or "civil action" omit-

ted,) "touching patent rights."

Secondly—The second and third subdivisions embrace "*civil actions*" only.

The case of New Orleans v. the Steamship Company, 20 Wallace, did not arise in a "*patent case*," in fact, the provisions of §669, and 701, were not in existence when the appeal or writ of error in that case issued.

Whatever may have been the intention of Congress in distinguishing between the cases now within the jurisdiction of this court, and those before the revision of the statutes, it is apparent that the jurisdiction of this court is thereby extended to a review of JUDGMENTS AT LAW, other than judgments, &c., in "*civil actions*," and this, too, without a "*certificate of division*" or of *divided opinion*, under §697.

Even in the "CROSBY CASE," (3 *Wils.* 180.) Lord Chief Justice Grey, strongly intimated that in all cases, except Treason, and Felony, a writ of error was grantable, of course, after final judgment at law.

A judgment at law is not of necessity a judgment in a civil action. Although the guilt of Hayes has not been judicially determined the sentence is *final judgment.*

When the solemn judgment of a court of competent jurisdiction is pronounced in any case, it becomes the sentence of the law upon the matter of record before it, and as such is a "judgment at law," within the meaning of the statute cited: 3 Bl. Com. 395-396, whether it be a civil action or a special proceeding.

III. It is submitted that even if the proceedings below had been wholly within the scope of the jurisdiction below, the Court had no power to pass sentence until the guilt of the plaintiff had been pro-

nounced. Until this is done, innocence is presumed.

The alternate character of the sentence seems to be unauthorized; the power conferred by statute being fine or imprisonment and not both (*Rev. Stat.* § 725). It is respectfully submitted, that this Court has jurisdiction to review the proceedings in question, and that the motion to dismiss for want of jurisdiction should be denied with costs.

J. H. WHITELEGGE,

Att'y and of Counsel for Plaintiff in Error.